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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CRISPUS NIX, Warden of the Iowa State Penitentiary,

Petitioner,

v.

EMMANUEL CHARLES WHITESIDE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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CONSTITUTIONAL PROVISIONS, IOWA CODE PROVISIONS AND AMERICAN BAR ASSOCIATION MODEL RULES AND STANDARDS INVOLVED

Fourth Amendment, United States Constitution

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .

Fifth Amendment, United States Constitution

No person shall be . . . compelled in any criminal case to be a witness against himself . . . .

Sixth Amendment, United States Constitution

In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defence.

Iowa Code of Professional Responsibility for Lawyers (1980)

DR 2-110 Withdrawal from Employment.

(A) In general.

(1) If permission for withdrawal from employment is required by the rules of a tribunal, a lawyer shall not withdraw from employment in a proceeding before that tribunal without its permission.

(2) In any event, a lawyer shall not withdraw from employment until he has taken reasonable steps to avoid foreseeable prejudice to the rights of his client, including giving due notice to his client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, and complying with applicable laws and rules.

(3) A lawyer who withdraws from employment shall refund promptly any part of a fee paid in advance that has not been earned.

(B) Mandatory withdrawal.

A lawyer representing a client before a tribunal, with its permission if required by its rules, shall withdraw from employment, and a lawyer representing a client in other matters shall withdraw from employment, if:

(1) He knows or it is obvious that his client is bringing the legal action, conducting the defense, or asserting a position in the litigation, or is otherwise having steps taken for him, merely for the purpose of harassing or maliciously injuring any person.

(2) He knows or it is obvious that his continued employment will result in violation of a Disciplinary Rule.

(3) His mental or physical condition renders it unreasonably difficult for him to carry out the employment effectively.

(4) He is discharged by his client.

(C) Permissive withdrawal.

If DR 2-110(B) is not applicable, a lawyer may not request permission to withdraw in matters pending before a tribunal, and may not withdraw in other matters, unless such request or such withdrawal is because:

(1) His client:

(a) Insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law.

(b) Personally seeks to pursue an illegal course of conduct.

(c) Insists that the lawyer pursue a course of conduct that is illegal or that is prohibited under the Disciplinary Rules.

(d) By other conduct renders it unreasonably difficult for the lawyer to carry out his employment effectively.

(e) Insists, in a matter not pending before a tribunal, that the lawyer engage in conduct that is contrary to the judgment and advice of the lawyer but not prohibited under the Disciplinary Rules.

(f) Deliberately disregards an agreement or obligation to the lawyer as to expenses or fees.

(2) His continued employment is likely to result in a violation of a Disciplinary Rule.

(3) His inability to work with co-counsel indicates that the best interests of the client likely will be served by withdrawal.

(4) His mental or physical condition renders it difficult for him to carry out the employment effectively.

(5) His client knowingly and freely assents to termination of his employment.

(6) He believes in good faith, in a proceeding pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal.

EC 2-34

A decision by a lawyer to withdraw should be made only on the basis of compelling circumstances, and in a matter pending before a tribunal he must comply with the rules of the tribunal regarding withdrawal. A lawyer should not withdraw without considering carefully and endeavoring to minimize the possible adverse effect on the rights of his client and the possibility of prejudice to his client as a result of his withdrawal. Even when he justifiably withdraws, a lawyer should protect the welfare of his client by giving due notice of his withdrawal, suggesting employment of other counsel, delivering to the client all papers and property to which the client is entitled, co-operating with counsel subsequently

employed, and otherwise endeavoring to minimize the possibility of harm. Further, he should refund to the client any compensation not earned during the employment.

DR 4-101 Preservation of Confidences and Secrets of a Client.

(A) "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

(B) Except when permitted under DR 4-101(C), a lawyer shall not knowingly:

(1) Reveal a confidence or secret of his client.

(2) Use a confidence or secret of his client to the disadvantage of the client.

(3) Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure.

(C) A lawyer may reveal:

(1) Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them.

(2) Confidences or secrets when permitted under Disciplinary Rules or required by law or court order.

(3) The intention of his client to commit a crime and the information necessary to prevent the crime.

(4) Confidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct.

(D) A lawyer shall exercise reasonable care to prevent his employees, associates, and others whose services are utilized by him from disclosing or using confidences or secrets of

a client, except that a lawyer may reveal the information allowed by DR 4-101(C) through an employee.

DR 5-102 Withdrawal as Counsel When the Lawyer Becomes a Witness.

. . .

(B) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm may be called as a witness other than on behalf of his client, he may continue the representation until it is apparent that his testimony is or may be prejudicial to his client.

DR 7-102 Representing a Client Within the Bounds of the Law.

(A) In his representation of a client, a lawyer shall not:

. . .

(4) Knowingly use perjured testimony or false evidence.

. . .

(7) Counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent.

. . .

(B) A lawyer who receives information clearly establishing that:

(1) His client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal in all circumstances except when barred from doing so by section 622.10, The Code. If he is barred from doing so by section 622.10, he shall immediately withdraw from the repre-

sentation of the client unless the client fully discloses the fraud to the person or tribunal.

. . .

EC 7-5

A lawyer as adviser furthers the interest of his client by giving his professional opinion as to what he believes would likely be the ultimate decision of the courts on the matter at hand and by informing his client of the practical effect of such decision. He may continue in the representation of his client even though his client has elected to pursue a course of conduct contrary to the advice of the lawyer so long as he does not thereby knowingly assist the client to engage in illegal conduct or to take a frivolous legal position. A lawyer should never encourage or aid his client to commit criminal acts or counsel his client on how to violate the law and avoid punishment therefor.

EC 7-8

A lawyer should exert his best efforts to insure that decisions of his client are made only after the client has been informed of relevant considerations. A lawyer ought to initiate this decision-making process if the client does not do so. Advice of a lawyer to his client need not be confined to purely legal considerations. A lawyer should advise his client of the possible effect of each legal alternative. A lawyer should bring to bear upon this decision-making process the fullness of his experience as well as his objective viewpoint. In assisting his client to reach a proper decision, it is often desirable for a lawyer to point out those factors which may lead to a decision that is morally just as well as legally permissible. He may emphasize the possibility of harsh consequences that might result from assertion of legally permissible positions. In the final analysis, however, the lawyer should always remember that the decision whether to forego legally available objectives or methods because of nonlegal factors is ultimately for the client and not for himself. In the event that the client in a non-adjudicatory matter insists upon a course of conduct that

is contrary to the judgment and advice of the lawyer but not prohibited by Disciplinary Rules, the lawyer may withdraw from the employment.

Model Rules of Professional Conduct (1983)

The Preamble and the Comment to Rules 1.6 and 3.3 are set forth in the Appendix.

RULE 1.2 Scope of Representation

. . .

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

. . .

RULE 1.4 Communication

. . .

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

RULE 1.6 Confidentiality of Information

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or

(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

RULE 1.16 Declining or Terminating Representation

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the rules of professional conduct or other law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

(3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if:

(1) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(2) the client has used the lawyer's services to perpetrate a crime or fraud;

(3) the client insists upon pursuing an objective that the lawyer considers repugnant or imprudent;

(4) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(5) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(6) other good cause for withdrawal exists.

(c) When ordered to so do by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law.

RULE 3.3 Candor Toward the Tribunal

(a) A lawyer shall not knowingly:

(1) make a false statement of material fact or law to a tribunal;

(2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;

(3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

(b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance

requires disclosure of information otherwise protected by Rule 1.6.

(c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

(d) In an *ex parte* proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

RULE 3.7 Lawyer as Witness

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:

(1) the testimony relates to an uncontested issue;

(2) the testimony relates to the nature and value of legal services rendered in the case; or

(3) disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9

Standards for Criminal Justice, Proposed Standard 4-7.7 (1979)

Testimony by the defendant

. . .

(c) If withdrawal from the case is not feasible or is not permitted by the court, or if the situation arises immediately preceding trial or during the trial and the defendant insists upon testifying perjuriously in his or her own behalf, it is unprofessional conduct for the lawyer to lend aid to the perjury or use the perjured testimony. Before the defendant takes the stand in these circumstances, the lawyer should make a record of the fact that the defendant is taking the stand against the advice of counsel in some appropriate man-

ner without revealing the fact to the court. The lawyer may identify the witness as the defendant and may ask appropriate questions of the defendant when it is believed that the defendant's answers will not be perjurious. As to matters for which it is believed the defendant will offer perjurious testimony, the lawyer should seek to avoid direct examination of the defendant in the conventional manner; instead, the lawyer should ask the defendant if he or she wishes to make any additional statement concerning the case to the trier or triers of the facts. A lawyer may not later argue the defendant's known false version of facts to the jury as worthy of belief, and may not recite or rely upon the false testimony in his or her closing argument.

Editorial Note

This proposed standard was approved by the ABA Standing Committee on Association Standards for Criminal Justice but was withdrawn prior to submission of this chapter to the ABA House of Delegates. Instead, the question of what should be done in situations dealt with by the standard has been deferred until the ABA Special Commission on Evaluation of Professional Standards reports its final recommendations.

Standards Relating to the Prosecution Function and the Defense Function §7.7 (Approved Draft 1971)

Testimony by the defendant

. . .

(c) If withdrawal from the case is not feasible or is not permitted by the court, or if the situation arises during the trial and the defendant insists upon testifying falsely in his own behalf, the lawyer may not lend his aid to the perjury. Before the defendant takes the stand in these circumstances, the lawyer should make a record of the fact that the defendant is taking the stand against the advice of counsel in some appropriate manner without revealing the fact to the court. The lawyer must confine his examination to identifying the

witness as the defendant and permitting him to make his statement to the trier or the triers of the facts; the lawyer may not engage in direct examination of the defendant as a witness in the conventional manner and may not later argue the defendant's known false version of facts to the jury as worthy of belief and he may not recite or rely upon the false testimony in his closing argument.

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BRIEF OF THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

THE INTEREST OF THE AMICUS CURIAE

For more than three-quarters of a century, the American Bar Association has played a leadership role in the development of ethical standards for the legal profession. In 1908 the Association promulgated the Canons of Ethics; in 1969, the Model Code of Professional Responsibility; and in 1983, the Model Rules of Professional Conduct. The Canons and the Code were almost universally adopted by the states to govern the conduct of the lawyers they licensed. The Rules have already been adopted by two states and some federal courts. They have been recommended for adoption by the practicing bar in thirteen other states. They are under active consideration in almost every other jurisdiction.

At issue before this Court is the constitutionality of the provisions of the Iowa Code of Professional Responsibility for Lawyers that govern the duties of the lawyer who learns that a client intends to offer perjured testimony at trial. The Iowa

Code is substantially identical in this respect to the ABA Model Code and to the parallel provisions of the ABA Model Rules. These ethical standards attempt to balance the lawyer's duty of loyalty to the client, which includes the duty to maintain the confidentiality of the client's communications, with the lawyer's duty to be candid with the court and to not allow himself or herself to be used as an instrument of deception.

The resolution of this issue by this Court is likely to affect the ethical standards governing the conduct of lawyers throughout the United States. The American Bar Association, therefore, has a vital interest in the outcome.

SUMMARY OF ARGUMENT

The American Bar Association appears as *amicus curiae* to address the question of what measures a lawyer is ethically obligated to take upon learning that a client intends to offer false testimony, and to show that the measures so taken do not violate the client's right to the effective assistance of counsel as guaranteed to him or her by the Sixth Amendment of the United States Constitution.

This *amicus* also argues that a lawyer whose client intends to offer false testimony is prohibited by ethical standards from participating in the presentation of that testimony, and that such a prohibition does not deprive a client of the Sixth Amendment's guarantee of effective assistance of counsel.

ARGUMENT OF THE AMICUS CURIAE

I. A LAWYER'S ETHICAL DUTY TO AVOID THE KNOWING USE OF FALSE TESTIMONY BY A CLIENT DOES NOT OFFEND THE SIXTH AMENDMENT GUARANTEE OF EFFECTIVE ASSISTANCE OF COUNSEL.

A. A Lawyer Who Learns That a Client Intends to Offer False Testimony Must Attempt to Dissuade the Client from Doing So.

Established ethical standards reject the notion that a client can require a lawyer to orchestrate false testimony. They call upon a lawyer who discovers that a client intends to offer perjured testimony to attempt to persuade the client to refrain from doing so. Iowa Code of Professional Responsibility for Lawyers ECs 7-5, 7-8 (1980) [hereinafter cited as Iowa Code]; Model Rules of Professional Conduct Rules 1.2(d), 1.4(b), Rule 3.3 Comment (1983) [hereinafter cited as Model Rules].

In so counseling the client, the lawyer is obligated to warn of the undesirable consequences that may follow upon the client's perjured testimony. *Id.* These include the possibility that the falsehood will become known to the prosecution, which may rely thereon to undermine the defendant's credibility and/or to initiate a separate prosecution against the defendant for perjury. The obligation to fully inform the client also requires the lawyer to disclose the effects upon the representation itself which flow from the client's determination to testify falsely. These are discussed below.

By fully advising the client, the lawyer complies not only with applicable ethical standards but also with his or her common law fiduciary duty as an agent. Iowa Code, *supra*, ECs 7-5, 7-8; Model Rules, *supra*, Rules 1.2(d), 1.4(b), Rule 3.3 Comment; Restatement (Second) of Agency §381 (1957); *see Evans* v. *State*, 477 S.W.2d 94 (Mo. 1972). This duty of the lawyer — to make sure that the client is sufficiently

informed of the foreseeable consequences of contemplated behavior in order to make an informed decision — is fully consistent with the Sixth Amendment guarantee of effective assistance of counsel. U.S. Const. amend. VI; *see Cooks* v. *United States*, 461 F.2d 530 (5th Cir. 1972).

B. A Lawyer Who is Unable to Dissuade a Client from Offering False Testimony Must Seek to Withdraw.

The lawyer who learns that a client insists upon testifying falsely must initially attempt to withdraw without advising the trial judge of the reason for the request. Iowa Code, *supra* p. 3, DR 2-110, EC 2-34; Model Rules, *supra* p. 3, Rule 1.16, Rule 3.3 Comment. The unsupported motion to withdraw may, of course, not be granted. The closer the request is made to the trial, the less likely it is to be granted.

Once jeopardy has attached, the trial judge may be even more reluctant to allow a lawyer to withdraw without a statement on the record disclosing the basis for the request. Since the withdrawal of the defendant's counsel is likely to necessitate a mistrial, there must be a demonstration of "manifest necessity" to avoid a double jeopardy bar to a retrial. *Arizona* v. *Washington*, 434 U.S. 497 (1978). The trial judge may conclude that "manifest necessity" cannot be demonstrated if the record does not fully disclose the basis for permitting the lawyer to withdraw.

Nevertheless, the lawyer is obligated to make an attempt to reconcile the duty to avoid any personal participation in deceiving the court with the duty to make as little disclosure of client communications as possible. The lawyer does so by moving to withdraw without disclosing the client's determination to give perjured testimony.

C. A Lawyer Whose Motion to Withdraw is Denied Must Not Participate in Deceiving the Court.

1. A Lawyer May Not Actively Assist in the Presentation of False Testimony.

It has been suggested that if the lawyer's motion to withdraw without disclosing the basis for the request is denied, the lawyer has no alternative other than to assist the client in the presentation of the false testimony both on direct examination and in the summation. That approach is rationalized by the argument that if the defendant insists upon taking the stand to testify falsely any attempt by the lawyer to treat or present that testimony differently from any other would constitute a penalty imposed upon the client for the confidential communications from which the lawyer learned that the testimony was false. It is further argued that since the sanctity of confidential communication is essential to proper representation, any action adverse to the client as a result of information communicated in confidence may not be tolerated. Thus, it is said, "the obligation of confidentiality, in the context of our adversary system, apparently allows the attorney no alternative to putting a perjurious witness on the stand without explicit or implicit disclosure of the attorney's knowledge to either the judge or the jury." Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 Mich. L. Rev. 1469, 1477-78 (1966).

This argument relies upon the incorrect premise that the confidentiality of client communications is and historically has been regarded in the law as inviolate. To the contrary, the standards of lawyer conduct as well as the law of privilege have long recognized exceptions to the duty of confidentiality. *See, e.g.*, the Canon excluding a client's announced intention to commit a crime from the lawyer's duty of confidentiality, Canons of Professional Ethics Canon 37 (1937); the Iowa Rule permitting a lawyer to reveal a client's intention to commit a crime and the information necessary to prevent it, Iowa Code, *supra* p. 3, DR 4-101(C)(3); and, more narrowly, the Model Rule provision permitting disclosure of

information where reasonably necessary to prevent a client from committing a criminal act likely to result in imminent death or substantial bodily injury, Model Rules, *supra* p. 3, Rule 1.6(b)(1). Also, Model Rule 3.3 requires disclosure as a remedial measure in the client perjury situation when all other remedial measures have failed, specifying that other Rules governing confidentiality are thereby superseded, *id.* Rule 3.3(a)(4), (b). The "crime/fraud" exception to the attorney-client privilege likewise recognizes that the duty of confidentiality in communications between lawyer and client does not extend to prospective criminal or fraudulent conduct by the client. *In re Selser*, 15 N.J. 393, 105 A.2d 395 (1954); *State* v. *Phelps*, 24 Or. App. 329, 332, 545 P.2d 901, 904 (1976); *McCormick on Evidence* §95 (E. Cleary 3d ed. 1984).

The argument that a lawyer ought to assist the client in orchestrating the perjury has in fact been strongly disapproved:

> A lawyer . . . advocates but does not *identify* with his client. The alter ego or "mouthpiece" school of thought, which is happily a minute fraction of the legal profession, would carry this perverted notion to the point of complete identification of lawyer with client, *i.e.*, the lawyer as an extension of the accused himself with a community of interest, motivation and goals, bound to engage in falsehood and chicane at the command of the client. These concepts have long been rejected . . . and find no acceptance among honorable members of the bar.
>
> The lawyer . . . should be . . . a professional advocate with a highly important but none the less limited function, *i.e.*, *limited and circumscribed by the rules of the system and the ethics of the profession.* At the trial stage his duty is to put the prosecution to its proof, to test the case against the accused, to insist that the procedural safeguards be followed

> *and to put forward evidence which is valid, relevant and helpful to his client.*

Johnson v. *United States*, 360 F.2d 844, 846 (D.C. Cir. 1966) (Burger, J., concurring) (emphasis supplied). *See also* Iowa Code, *supra* p. 3, DR 7-102(A)(4), (7); Model Rules, *supra* p. 3, Rules 1.2(d), 3.3(a)(4), which prohibit a lawyer's knowing use of perjured testimony and counseling or assisting a client in conduct that the lawyer knows is criminal or fraudulent. These ethical standards are fully consistent with the United States Constitution.[1]

The Constitution does not guarantee a criminal defendant a right to testify falsely. *Harris* v. *New York*, 401 U.S. 222, 225 (1971). "[W]hen defendants testify, they must testify truthfully or suffer the consequences." *United States* v. *Havens*, 446 U.S. 620, 626 (1980). In *Harris*, this Court held that a criminal defendant who commits perjury is subject to impeachment on the basis of prior inconsistent statements, even if those statements were obtained in violation of the procedural safeguards mandated by *Miranda* v. *Arizona*, 384 U.S. 436 (1966). In so holding, the Court concluded that a criminal defendant's Fifth Amendment rights under *Miranda* "cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances." 401 U.S. at 226.

It follows that the Sixth Amendment guarantee of effective assistance of counsel may not be perverted into an instrument with which to compel a lawyer, a member of an

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1. The Comment to Model Rule 3.3 cautions lawyers that certain cases (some of which are cited *infra* p. 9) have held that the Sixth Amendment guarantee of effective assistance of counsel conflicts with the duties that the Rule would impose. This acknowledges the reality that in some jurisdictions lawyers are bound to adhere to those rulings until and unless they are reversed. The policy-making body of the *amicus curiae* does not agree with those court decisions and by this brief urges the Court to find that the lawyer's duty to preserve the integrity of the administration of justice by refusing to participate in the client's false testimony is not inconsistent with the guarantee of effective assistance of counsel.

honorable profession sworn to uphold the law and to further the administration of justice, to aid and abet one determined to violate the testimonial oath and illegally to deceive the tribunal into finding as true that which he or she knows is false. To conclude otherwise is to assert that the Sixth Amendment would force a lawyer to assist a client to accomplish that which this Court has held the Constitution does not protect—perjured testimony. *Harris* v. *New York*, 401 U.S. 222 (1971).

2. A Lawyer May Not Permit a Client to Testify Falsely in Narrative Form.

Another suggested resolution of the problem facing the lawyer whose client is determined to testify falsely is for the lawyer to allow the client to testify in narrative form rather than by question and answer. Proposed Defense Standard 4-7.7 of the American Bar Association's Standing Committee on Association Standards for Criminal Justice provided that:

> As to matters for which it is believed the defendant will offer perjurious testimony, the lawyer should seek to avoid direct examination of the defendant in the conventional manner; instead, the lawyer should ask the defendant if he or she wishes to make any additional statement concerning the case to the trier or triers of the facts. A lawyer may not later argue the defendant's known false version of facts to the jury as worthy of belief, and may not recite or rely upon the false testimony in his or her closing argument.

Standards for Criminal Justice, Proposed Standard 4-7.7 (1979).[2]

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2. This proposed standard, had it been adopted, would have closely followed Standard 7.7 of the Standards Relating to the Prosecution Function and the Defense Function (Approved Draft 1971) which had been adopted earlier by the American Bar Association's House of Delegates. However, when the Association's Criminal Justice Section proposed a

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While several lower court decisions, including that here under review, have suggested that the lawyer whose client insists upon testifying falsely may ask the client to continue to testify in narrative fashion, (*see, e.g., Whiteside* v. *Scurr*, 744 F.2d 1323, *reh'g denied*, 750 F.2d 713 (8th Cir. 1984); *Lowery* v. *Cardwell*, 575 F.2d 727 (9th Cir. 1978)), other lower courts have expressed approval of a lawyer's refusal to in any way participate in offering testimony known to be false. *United States* v. *Curtis*, 742 F.2d 1070 (7th Cir. 1984); *McKissick* v. *United States*, 379 F.2d 754 (5th Cir. 1967), *aff'd after remand*, 398 F.2d 342 (5th Cir. 1968); *Dodd* v. *The Florida Bar*, 118 So. 2d 17, 19 (Fla. 1960).

The ethical standards of the profession adopt the latter view. Thus they prohibit the knowing use by the lawyer of perjured testimony. Iowa Code, *supra* p. 3, DR 7-102(A)(4); Model Rules, *supra* p. 3, Rule 3.3(a)(4), Rule 3.3 Comment. They reject the narrative testimony resolution for several reasons.

That approach undermines the lawyer's duty not to assist, even passively, in the client's attempt to perpetrate a fraud and mislead the court. *See* Iowa Code, *supra* p. 3, DR 7-102(A)(7); Model Rules, *supra* p. 3, Rule 1.2(d), Rule 3.3 Comment. Yet, at the same time, it subjects the client to an implicit disclosure of confidential communications, at least to the trial judge and the prosecutor. Moreover, the narrative approach would be an unsatisfactory resolution of the

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revised set of standards to the House of Delegates in 1979, this standard supporting the narrative testimony approach to the client perjury problem was withdrawn from consideration. *See* Editorial Note, Standards for Criminal Justice Proposed Standard 4-7.7 (1979). At the same time, the American Bar Association's Commission on Evaluation of Professional Standards was drafting the Model Rules of Professional Conduct. Model Rule 3.3 and its Comment, which were adopted by the House of Delegates in 1983, provide a different resolution of the client perjury problem. The Comment to Model Rule 3.3 expresses disagreement with the approach embodied in the former standard. Model Rules, *supra* p. 3, Rule 3.3, Rule 3.3 Comment.

dilemma even from the client's standpoint because it would permit the lawyer, unilaterally and without review, to make a decision that would deny the client the benefit of a trial conducted in the usual manner in which all exculpatory evidence is argued to the jury.

D. If a Client Persists in Testifying Falsely and the Lawyer Has Been Unable to Withdraw, the Lawyer Must Disclose the Perjury to the Trial Court.

When the client insists upon testifying falsely and the lawyer cannot acquiesce in presenting the evidence he or she knows is false and cannot withdraw without disclosing the basis for the request, this *amicus* submits that there remains only one possible course of action. The lawyer who for those reasons cannot proceed further on his or her own authority has a duty to disclose the client's perjury to the trial court and to seek the court's guidance. Model Rules, *supra* p. 3, Rule 3.3(a)(4), (b); Iowa Code, *supra* p. 3, DR 7-102(B)(1); *Committee on Professional Ethics and Conduct of Iowa State Bar Association* v. *Crary*, 245 N.W.2d 298 (Iowa 1976). Model Rule 3.3 (Candor Toward the Tribunal) places a duty of disclosure upon the lawyer as a "reasonable remedial measure," even if compliance requires disclosure of confidential information. Disclosure of the perjury is resorted to only when other measures have failed to remedy the situation. Model Rules, *supra* p. 3, Rule 3.3 Comment. The Iowa Code, when viewed in light of *Crary*, similarly places a duty of disclosure upon the lawyer. In *Crary*, the court observed that a client, in committing perjury, acts outside the attorney-client relationship, and that his or her confidences in relation to the perjury are therefore not entitled to the protection which otherwise could be expected. The Fifth Circuit, in holding that double jeopardy did not bar a retrial of a criminal defendant after a mistrial was declared based on the defendant's perjury, stated that defense counsel had a "professional, ethical and public duty to report [the perjury]." *McKissick* v. *United States*, 379 F.2d 754, 761 (5th Cir. 1967), *aff'd after remand*, 398 F.2d 342 (5th Cir. 1968).

The lawyer should discharge this duty of disclosure to the trial court by revealing only those facts necessary to obtain appropriate instructions. Model Rules, *supra* p. 3, Rule 1.6 Comment. The lawyer thereby limits the breach of client confidentiality to that absolutely necessary to fulfill the need justifying disclosure.

Once this limited disclosure has been made, "[i]t is for the court then to determine what should be done." *Id.* Rule 3.3 Comment. A judicial determination in these circumstances is far more compatible with the Sixth Amendment guarantee of effective assistance of counsel than the lawyer's unilateral conclusion that the client should be denied a defense conducted in the traditional manner. *Cf. United States* v. *Carrigan*, 543 F.2d 1053 (2d Cir. 1976) (the determination of whether a lawyer's conflicting interests deprived his client of effective assistance properly belongs to the judge, rather than to the lawyer).

This method of remedying a client's unlawful conduct by seeking the guidance of the public official in charge of the trial restores the integrity of the adversarial process so that the trial may proceed fairly. The accomplishment of this objective is intended by the Sixth Amendment guarantee of effective assistance of counsel as made clear in *Strickland* v. *Washington*, — U.S. —, 104 S. Ct. 2052 (1984). There the Court said that the purpose of the constitutional requirement of effective assistance is "to ensure a fair trial . . . " *Id.* at 2064. The Court went on to say that "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.*

The proper functioning of the adversarial process is premised upon, among other factors, truthful testimony. *See United States* v. *Havens*, 446 U.S. 620 (1980). As this Court reaffirmed in *Havens*, "truth is a fundamental goal of our legal system." 446 U.S. at 626. This concept is supported and

enforced by statutes uniformly adopted across the country which make perjury a crime.

The distortion which results from the use of false testimony at trial leads to an increased likelihood of an unfair result being obtained. The most reasonable action the lawyer can take under these circumstances is the disclosure of the perjury, because it insures that the outcome will instead be determined on the basis of truthful testimony. This disclosure, which is limited to the trial court and not made in the presence of the jury, enables the trial court to determine what should be done so that the trial proceeds fairly.

The disclosure of perjury as required by the profession's ethical standards fulfills the lawyer's responsibility as an officer of the court. *See* Model Rules, *supra* p. 3, Preamble. It would be an anomaly to view a lawyer's disclosure in these circumstances as "undermin[ing] the proper functioning of the adversarial process." *Strickland*, 104 S.Ct. at 2064. In fact, by restoring the element of fairness to the trial, disclosure not only does not offend, but is in fact consistent with, the purpose underlying the constitutional requirement of effective assistance articulated by this Court in *Strickland*.

In *Strickland* this Court set forth a two-pronged test for claims of ineffective assistance. The first prong of that test requires a demonstration that the defense lawyer's performance was deficient. 104 S.Ct. at 2064. The standard used is whether the lawyer's performance is that of "reasonably effective assistance." *Id.* Further, judicial scrutiny of this performance "must be highly deferential." *Id.* at 2065. In light of the fact that there is no constitutional right to testify falsely, *Harris* v. *New York*, 401 U.S. 222 (1971), the lawyer's disclosure of the client's perjury to the trial court cannot constitute ineffective assistance of counsel. Thus the first prong of the *Strickland* test for ineffective assistance of counsel is not satisfied by the conduct of a lawyer who, when confronted with a client determined to commit perjury, acts according to established ethical rules for the profession as described above.

The second prong of the *Strickland* test is a showing of prejudice: that the defense lawyer's acts deprived the client of a fair trial. 104 S.Ct. at 2064. A defense lawyer's disclosure of client perjury to the trial court for the purpose of seeking the court's guidance as to how to preserve the integrity of the trial when every other approach has failed does not deprive the client of any rights to which the client is entitled. To hold otherwise would create a constitutionally sanctioned right to the assistance of counsel to commit perjury. This would directly contravene the principles articulated by this Court in *Harris* and *Havens*. The second prong of the *Strickland* test is therefore likewise not satisfied.

This Court has not directly addressed a claim of denial of the Sixth Amendment guarantee of effective assistance of counsel in the context of a client's insistence upon committing perjury. The Court has addressed, however, related Fourth and Fifth Amendment claims in *United States* v. *Havens*, 446 U.S. 620 (1980) and *Harris* v. *New York*, 401 U.S. 222 (1971). U.S. Const. amend. IV, amend. V. In both cases, the Court held that the Constitution was not violated when certain adverse consequences befell a criminal defendant who testified falsely. In *Havens*, evidence obtained as a result of an unlawful search and seizure was permitted to be used to impeach a defendant's false testimony. In *Harris*, statements obtained in violation of the procedural safeguards required by *Miranda* v. *Arizona*, 384 U.S. 436 (1966), were also admissible for impeachment purposes. This Court rejected the notion that a defendant's constitutional rights could be "perverted into a license to use perjury by way of a defense," free from the risk of adverse consequences. *Havens*, 446 U.S. at 626; *Harris*, 401 U.S. at 226. This *amicus* urges the Court to hold, similarly, that a criminal defendant who commits perjury may not use the Sixth Amendment guarantee of effective assistance of counsel to secure an opportunity to testify falsely.

When all other measures have failed to remedy the situation, the purpose underlying the Sixth Amendment's guaran-

tee of effective assistance of counsel is best served by the lawyer's disclosure of the client's perjury to the trial court. Furthermore, such performance by the lawyer is not deficient according to the test established in *Strickland*.

II. A LAWYER MUST ADVISE A CLIENT OF THE CONSEQUENCES OF THE CLIENT'S PROPOSED CONDUCT AND THIS DUTY IS FULLY CONSISTENT WITH THE SIXTH AMENDMENT GUARANTEE OF EFFECTIVE ASSISTANCE OF COUNSEL.

A fundamental element of a lawyer's fiduciary responsibility to a client is the duty to apprise the client of the consequences that can reasonably be anticipated to follow upon any proposed approach to the representation. Restatement (Second) of Agency §381 (1957); *see Evans* v. *State*, 477 S.W.2d 94 (Mo. 1972). This is required to enable the client to make an informed decision concerning the alternatives available. The lawyer's discharge of the duty to so advise the defendant client in a criminal case must be recognized as an essential element of the effective assistance of counsel guaranteed by the Sixth Amendment.

Among the possible consequences of the client's conduct that the lawyer must disclose are those resulting from the legal and professional obligations to which the lawyer is subject. Those obligations include the lawyer's duty to seek to withdraw where continued representation would result in a violation of applicable ethical standards, Iowa Code, *supra* p. 3, DR 2-110(B)(2); Model Rules, *supra* p. 3, Rule 1.16(a)(1); the lawyer's duty not to assist the client in conduct that the lawyer knows is criminal or fraudulent, Iowa Code, *supra* p. 3, DR 7-102(A)(7); Model Rules, *supra* p. 3, Rule 1.2(d); and the lawyer's duty to disclose the client's false testimony if the client will not do so. Iowa Code, *supra* p. 3, DR 7-102(B)(1); Model Rules, *supra* p. 3, Rule 3.3(a)(4), (b), Rule 3.3 Comment.

In so advising a client, a lawyer must not deliberately mislead the client, however, even if the purpose is to persuade the client to abandon his or her determination to testify falsely. Thus, the lawyer could not properly suggest that if the client persists in giving false testimony, the lawyer will pursue courses of action that in fact are not available. For example, it is inconceivable that a lawyer would be permitted to testify about the client's perjury as a rebuttal witness for the prosecution while continuing to serve as the client's defense counsel. Iowa Code, *supra* p. 3, DR 5-102(B); Model Rules, *supra* p. 3, Rule 3.7(a); *United States* v. *Cortellesso* 663 F.2d 361 (1st Cir. 1981). Consequently it would be improper for the lawyer to suggest to the client that he or she would so testify while continuing to act as the client's counsel.[3]

In the instant case, the obligation to consult with the client required the lawyer to disclose to the client that the lawyer could not silently acquiesce in the client's intention to commit perjury, and that, if the client persisted, the lawyer would first have to move to withdraw without disclosing the basis for the request, and that if the motion was denied the lawyer would have to disclose the falsehood to the trial judge.

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3. The Court need not reach the question, not presented in this case, whether and under what circumstances a lawyer may be called to testify after he has withdrawn as counsel.

CONCLUSION

Amicus Curiae American Bar Association respectfully urges that the Court expressly find that the ethical standards as described above governing the duty of a lawyer whose client intends to commit perjury do not violate the Sixth Amendment guarantee of effective assistance of counsel.

Respectfully submitted,

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APPENDIX

Model Rules of Professional Conduct (1983)

PREAMBLE: A LAWYER'S RESPONSIBILITIES

A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.

As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others. As intermediary between clients, a lawyer seeks to reconcile their divergent interests as an advisor and, to a limited extent, as a spokesperson for each client. A lawyer acts as evaluator by examining a client's legal affairs and reporting about them to the client or to others.

In all professional functions a lawyer should be competent, prompt and diligent. A lawyer should maintain communication with a client concerning the representation. A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct or other law.

A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

As a public citizen, a lawyer should seek improvement of the law, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance, and should therefore devote professional time and civic influence in their behalf. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession's ideals of public service.

A lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done. So also, a lawyer can be sure that preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private.

In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an upright person while earning a satisfactory living. The Rules of Professional Conduct prescribe terms for resolving such conflicts. Within the framework of

these Rules many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules.

The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. This connection is manifested in the fact that ultimate authority over the legal profession is vested largely in the courts.

To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession's independence from government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.

The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar. Every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.

Lawyers play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system. The Rules of Professional Conduct, when properly applied, serve to define that relationship.

RULE 1.6 COMMENT:

The lawyer is part of a judicial system charged with upholding the law. One of the lawyer's functions is to advise clients so that they avoid any violation of the law in the proper exercise of their rights.

The observance of the ethical obligation of a lawyer to hold inviolate confidential information of the client not only facilitates the full development of facts essential to proper representation of the client but also encourages people to seek early legal assistance.

Almost without exception, clients come to lawyers in order to determine what their rights are and what is, in the maze of laws and regulations, deemed to be legal and correct. The common law recognizes that the client's confidences must be protected from disclosure. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

A fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation. The client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter.

The principle of confidentiality is given effect in two related bodies of law, the attorney-client privilege (which includes the work product doctrine) in the law of evidence and the rule of confidentiality established in professional ethics. The attorney-client privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such

information except as authorized or required by the Rules of Professional Conduct or other law. See also Scope.

The requirement of maintaining confidentiality of information relating to representation applies to government lawyers who may disagree with the policy goals that their representation is designed to advance.

Authorized Disclosure

A lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation, except to the extent that the client's instructions or special circumstances limit that authority. In litigation, for example, a lawyer may disclose information by admitting a fact that cannot properly be disputed, or in negotiation by making a disclosure that facilitates a satisfactory conclusion.

Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

Disclosure Adverse to Client

The confidentiality rule is subject to limited exceptions. In becoming privy to information about a client, a lawyer may foresee that the client intends serious harm to another person. However, to the extent a lawyer is required or permitted to disclose a client's purposes, the client will be inhibited from revealing facts which would enable the lawyer to counsel against a wrongful course of action. The public is better protected if full and open communication by the client is encouraged than if it is inhibited.

Several situations must be distinguished.

First, the lawyer may not counsel or assist a client in conduct that is criminal or fraudulent. See Rule 1.2(d). Similarly, a lawyer has a duty under Rule 3.3(a)(4) not to use false evidence. This duty is essentially a special instance of the

duty prescribed in Rule 1.2(d) to avoid assisting a client in criminal or fraudulent conduct.

Second, the lawyer may have been innocently involved in past conduct by the client that was criminal or fraudulent. In such a situation the lawyer has not violated Rule 1.2(d), because to "counsel or assist" criminal or fraudulent conduct requires knowing that the conduct is of that character.

Third, the lawyer may learn that a client intends prospective conduct that is criminal and likely to result in imminent death or substantial bodily harm. As stated in paragraph (b)(1), the lawyer has professional discretion to reveal information in order to prevent such consequences. The lawyer may make a disclosure in order to prevent homicide or serious bodily injury which the lawyer reasonably believes is intended by a client. It is very difficult for a lawyer to "know" when such a heinous purpose will actually be carried out, for the client may have a change of mind.

The lawyer's exercise of discretion requires consideration of such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. Where practical, the lawyer should seek to persuade the client to take suitable action. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to the purpose. A lawyer's decision not to take preventive action permitted by paragraph (b)(1) does not violate this Rule.

Withdrawal

If the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in Rule 1.16(a)(1).

After withdrawal the lawyer is required to refrain from making disclosure of the clients' confidences, except as otherwise provided in Rule 1.6. Neither this rule nor Rule 1.8(b)

nor Rule 1.16(d) prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like.

Where the client is an organization, the lawyer may be in doubt whether contemplated conduct will actually be carried out by the organization. Where necessary to guide conduct in connection with this Rule, the lawyer may make inquiry within the organization as indicated in Rule 1.13(b).

Dispute Concerning Lawyer's Conduct

Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(2) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend, of course, applies where a proceeding has been commenced. Where practicable and not prejudicial to the lawyer's ability to establish the defense, the lawyer should advise the client of the third party's assertion and request that the client respond appropriately. In any event, disclosure should be no greater than the lawyer reasonably believes is necessary to vindicate innocence, the disclosure should be made in a manner which limits access to the information to the tribunal or other persons having a need to know it, and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

If the lawyer is charged with wrongdoing in which the client's conduct is implicated, the rule of confidentiality should not prevent the lawyer from defending against the charge. Such a charge can arise in a civil, criminal or profes-

sional disciplinary proceeding, and can be based on a wrong allegedly committed by the lawyer against the client, or on a wrong alleged by a third person; for example, a person claiming to have been defrauded by the lawyer and client acting together. A lawyer entitled to a fee is permitted by paragraph (b)(2) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary. As stated above, the lawyer must make every effort practicable to avoid unnecessary disclosure of information relating to a representation, to limit disclosure to those having the need to know it, and to obtain protective orders or make other arrangements minimizing the risk of disclosure.

Disclosures Otherwise Required or Authorized

The attorney-client privilege is differently defined in various jurisdictions. If a lawyer is called as a witness to give testimony concerning a client, absent waiver by the client, paragraph (a) requires the lawyer to invoke the privilege when it is applicable. The lawyer must comply with the final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client.

The Rules of Professional Conduct in various circumstances permit or require a lawyer to disclose information relating to the representation. See Rules 2.2, 2.3, 3.3 and 4.1. In addition to these provisions, a lawyer may be obligated or permitted by other provisions of law to give information about a client. Whether another provision of law supersedes Rule 1.6 is a matter of interpretation beyond the scope of these Rules, but a presumption should exist against such a supersession.

Former Client

The duty of confidentiality continues after the client-lawyer relationship has terminated.

RULE 3.3 COMMENT:

The advocate's task is to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client is qualified by the advocate's duty of candor to the tribunal. However, an advocate does not vouch for the evidence submitted in a cause; the tribunal is responsible for assessing its probative value.

Representations by a Lawyer

An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer. Compare Rule 3.1. However, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule 1.2(d), see the Comment to that Rule. See also the Comment to Rule 8.4(b).

Misleading Legal Argument

Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(3), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction which has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

False Evidence

When evidence that a lawyer knows to be false is provided by a person who is not the client, the lawyer must refuse to offer it regardless of the client's wishes.

When false evidence is offered by the client, however, a conflict may arise between the lawyer's duty to keep the client's revelations confidential and the duty of candor to the court. Upon ascertaining that material evidence is false, the lawyer should seek to persuade the client that the evidence should not be offered or, if it has been offered, that its false character should immediately be disclosed. If the persuasion is ineffective, the lawyer must take reasonable remedial measures.

Except in the defense of a criminal accused, the rule generally recognized is that, if necessary to rectify the situation, an advocate must disclose the existence of the client's deception to the court or to the other party. Such a disclosure can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement. See Rule 1.2(d). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.

Perjury by a Criminal Defendant

Whether an advocate for a criminally accused has the same duty of disclosure has been intensely debated. While it is agreed that the lawyer should seek to persuade the client to refrain from perjurious testimony, there has been dispute concerning the lawyer's duty when that persuasion fails. If the confrontation with the client occurs before trial, the law-

yer ordinarily can withdraw. Withdrawal before trial may not be possible, however, either because trial is imminent, or because the confrontation with the client does not take place until the trial itself, or because no other counsel is available.

The most difficult situation, therefore, arises in a criminal case where the accused insists on testifying when the lawyer knows that the testimony is perjurious. The lawyer's effort to rectify the situation can increase the likelihood of the client's being convicted as well as opening the possibility of a prosecution for perjury. On the other hand, if the lawyer does not exercise control over the proof, the lawyer participates, although in a merely passive way, in deception of the court.

Three resolutions of this dilemma have been proposed. One is to permit the accused to testify by a narrative without guidance through the lawyer's questioning. This compromises both contending principles; it exempts the lawyer from the duty to disclose false evidence but subjects the client to an implicit disclosure of information imparted to counsel. Another suggested resolution, of relatively recent origin, is that the advocate be entirely excused from the duty to reveal perjury if the perjury is that of the client. This is a coherent solution but makes the advocate a knowing instrument of perjury.

The other resolution of the dilemma is that the lawyer must reveal the client's perjury if necessary to rectify the situation. A criminal accused has a right to the assistance of an advocate, a right to testify and a right of confidential communication with counsel. However, an accused should not have a right to assistance of counsel in committing perjury. Furthermore, an advocate has an obligation, not only in professional ethics but under the law as well, to avoid implication in the commission of perjury or other falsification of evidence. See Rule 1.2(d).

Remedial Measures

If perjured testimony or false evidence has been offered, the advocate's proper course ordinarily is to remonstrate with

the client confidentially. If that fails, the advocate should seek to withdraw if that will remedy the situation. If withdrawal will not remedy the situation or is impossible, the advocate should make disclosure to the court. It is for the court then to determine what should be done—making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing. If the false testimony was that of the client, the client may controvert the lawyer's version of their communication when the lawyer discloses the situation to the court. If there is an issue whether the client has committed perjury, the lawyer cannot represent the client in resolution of the issue, and a mistrial may be unavoidable. An unscrupulous client might in this way attempt to produce a series of mistrials and thus escape prosecution. However, a second such encounter could be construed as a deliberate abuse of the right to counsel and as such a waiver of the right to further representation.

Constitutional Requirements

The general rule—that an advocate must disclose the existence of perjury with respect to a material fact, even that of a client—applies to defense counsel in criminal cases, as well as in other instances. However, the definition of the lawyer's ethical duty in such a situation may be qualified by constitutional provisions for due process and the right to counsel in criminal cases. In some jurisdictions these provisions have been construed to require that counsel present an accused as a witness if the accused wishes to testify, even if counsel knows the testimony will be false. The obligation of the advocate under these Rules is subordinate to such a constitutional requirement.

Duration of Obligation

A practical time limit on the obligation to rectify the presentation of false evidence has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation.

Refusing to Offer Proof Believed to Be False

Generally speaking, a lawyer has authority to refuse to offer testimony or other proof that the lawyer believes is untrustworthy. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate. In criminal cases, however, a lawyer may, in some jurisdictions, be denied this authority by constitutional requirements governing the right to counsel.

Ex Parte Proceedings

Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in an ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.